No. 82-1037

Supreme Court of the United States

OCTOBER TERM, 1982

LONN A. TROST,

Appellant,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,

Appellee.

MANUEL F. ROTHBERG,

Real Party in Interest.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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Preliminary Statement

This appeal involves a single substantial federal question, namely, whether or not the Appellant, Lonn A. Trost, a non-resident of the State of California, had such minimal contacts with the State of California so that a California court could exercise personal jurisdiction over him. Unfortunately, the Motion to Affirm/Dismiss does not address that issue. Instead, the motion misstates the issues and Appellant's contentions, distorts the record below, and incorrectly states the facts.

In this brief, Appellant will clarify the record, correctly set forth the facts, and will then argue the following substantive issues:

1. Under the facts presented to the Los Angeles Superior Court there were insufficient minimal contacts for that court to exercise personal jurisdiction over the Appellant; and

2. The appeal is not moot by reason of the fact that Appellant eventually filed a general appearance in the Superior Court.

As a final matter, Appellant will discuss the procedural issue raised by the motion, namely, whether or not appeal or certiorari is the proper vehicle for review by this court.

Counter Statement of the Case

The Record

The Motion to Affirm/Dismiss accurately narrates the chronological sequence of the various proceedings in the California courts namely, the Superior Court, the Court of Appeal and the Supreme Court. However, the substantive issue raised by this appeal is to be determined solely on the record before the Superior Court where Appellant's Motion to Quash Service of Summons was filed and heard. The remaining court proceedings only involved the affirming without opinion of the Superior Court's ruling and Appellant's attempts to obtain stays so that he could prosecute his appeal to this court.

The procedure which has been set up by the California legislature for attacking service of summons is as follows. The served party may make a motion to quash on the ground of lack of jurisdiction of the court over him. *Code of Civil Proc.*, § 418.10(a)(1). Such a motion is generally heard and determined on the basis of declarations/affidavits [1] as was done in the case at bar. The plaintiff (or

[1] Under California law a declaration under penalty of perjury is the equivalent of an affidavit. *Code of Civ. Proc.* § 2015.5.

cross-complainant) has the burden of proving by a preponderance of the evidence [2] that the nonresident defendant had sufficent contacts with California to support service of process. *Frederick Fell, Inc.* v. *Superior Court*, 36 Cal. App. 3d 93, 95, n.3, 111 Cal. Rptr. 219 (1973); *Sheard* v. *Superior Court*, 40 Cal. App. 3d 207, 211, 114 Cal. Rptr. 743 (1974). The sufficiency of an affidavit is tested by the same rules as those applicable to oral testimony. *Mayo* v. *Beber*, 177 Cal. App. 2d 544, 551, 2 Cal. Rptr. 405 (1960). Affidavits which merely state conclusions of law or which are based on information and belief are hearsay, do not create a conflict as to facts and must be disregarded. *Petri Clearners, Inc.* v. *Automotive Emp. Laundry Drivers & Helpers Local No. 88*, 53 Cal. 2d 445, 469, n.5, 2 Cal. Rptr. 470 (1960). A verified complaint must meet the same standards as an affidavit. *E. H. Renzel Co.* v. *Warehousemen's Union*, 16 Cal. 2d 369, 370, 106 P.2d 1 (1940); *Continental Baking Co.* v. *Katz*, 68 Cal. 2d 512, 532, 67 Cal. Rptr. 761 (1968); *Macmorris Sales Corp.* v. *Kozak*, 249 Cal. App. 2d 998, 1003, 58 Cal. Rptr. 92 (1967).

If such a motion to quash is denied, then the defendant may petition the court of appeal by writ of mandate for a review of that decision. *Code of Civ. Proc.* § 418.10(c). This was done in the case at bar and the court of appeal denied the writ without opinion, thus affirming the ruling of the Superior Court. Appellant's last opportunity for review in the California court system was the filing of a petition for a hearing in the California Supreme Court which he did and which was denied. Thus, for the purpose of reviewing and deciding the substantive issue on this appeal, attention must be focused on the *facts presented to the Superior Court* by Appellant and by Rothberg. The

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[2] Preponderance of the evidence means such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein. *Butcher* v. *Thornhill*, 14 Cal. App. 2d 149, 152, 58 P.2d 179 (1936).

question for determination, then, is whether or not these facts showed sufficient minimal contacts of Appellant with the State of California.

The facts which were before the Superior Court were set forth in three documents: (1) the declaration of Appellant; (2) the verified cross-complaint filed by Rothberg; and (3) portions of Appellant's deposition testimony. Thus, the determination of whether or not there were sufficient minimal contacts must be made on the basis of those documents and no others. Hearsay statements, statements on information and belief and conclusions of law contained therein must be disregarded. These facts were accurately set forth in Appellant's Jurisdictional Statement, pp. 4-9.

Misstatements by Rothberg of the Facts

No other facts were before the Superior Court relating to the contacts, minimal or otherwise, of Appellant with California. But, the Motion to Affirm/Dismiss improperly alludes to other facts and non-facts which were not before the Superior Court. The Motion states [p. 3] that Appellant promised to pay Rothberg 10% of the gross proceeds and that this promise was first discussed in a telephone call made by Appellant to Rothberg. There was no evidence before the Superior Court to support those statements. Appellant did not promise Rothberg anything. *The contract to pay Rothberg 10% of the gross proceeds of the sale is between Rothberg and the Trustee. Appellant is not a party thereto.* Secondly, Appellant did not call Rothberg. To the contrary, Appellant stated that Rothberg called Appellant in New York to advise him there would be a meeting with the Trustee the following week. Rothberg erroneously states [pp. 3-4] that Appellant represented to Rothberg at the meeting in New York that the agreement need not be reduced to writing. There is no evidence to support that statement. That statement is based on an allegation in the cross-complaint based on information and belief and accordingly must be disregarded. Rothberg also states [p. 5] that "much of the profit [was] transferred to New York."

There is not a single fact in the record to support that statement. Rothberg states [p. 5] that Appellant repudiated the agreement. Again there is nothing in the record to support such an assertion. Indeed, Rothberg concedes that Appellant was not a party to the contract. Finally, Rothberg refers [p. 14, n. 5] to other proceedings in the Superior Court held *after* the hearing on the motion to quash which, of course, are not part of the record on this appeal.

In his motion Rothberg makes the following statement:

> "If Appellant's 'facts' [as stated in Appellant's Jurisdictional Statement filed December 18, 1982] were the true facts, the results might have been different in the Courts Below, but they are not anywhere near the true facts, as the Courts Below could and did easily determine from the record and the evidence presented to them." [p. 3]

As can be seen from the summary of the evidence, above, the facts presented by Appellant in his Jurisdictional Statement were, in fact, the true facts. Moreover, the statement is misleading because it suggests that the facts presented to California courts other than the Superior Court are relevant to the issue on this appeal. Not true. The appeal stands or falls on the basis of the record *presented to the Superior Court*. As can be seen from the above summary, the facts presented by Rothberg were essentially the same facts presented by Appellant relating to the discussions of the agreement and the processing of the paper work in the Bankruptcy Court *all of which occurred in New York*. Rothberg fails to allege a single fact showing any contact by Appellant with the State of California which, of course, is the critical issue on this appeal. It is not sufficient to argue, as Rothberg does herein, that because he, a California resident, was allegedly damaged by a nonresident, California has jurisdiction of the nonresident. That argument is an over-simplified non sequitur unsupported by case authority.

ARGUMENT

I

Appellant Lacked Sufficient Minimal Contacts With California to Justify the Exercise of Personal Jurisdiction Over Him by the California Courts.

California courts are by statute permitted to exercise jurisdiction over nonresidents "on any basis not inconsistent with the Constitution of this state or of the United States." *Code of Civ. Proc.* § 410.10. "This statute manifests an intent to exercise the broadest possible jurisdiction. The constitutional parameters of this jurisdiction are found in the decisions of the United States Supreme Court." *Michigan National Bank* v. *Superior Court,* 23 Cal. App. 3d 1, 6, 99 Cal. Rptr. 823 (1972). "As a general constitutional principle, a court may exercise personal jurisdiction over a nonresident individual so long as he has such minimal contacts with the state that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Sibley* v. *Superior Court,* 16 Cal. 3d 442, 445; 128 Cal. Rptr. 34 (1976).

The evidence presented to the Superior Court failed to show any contacts whatsoever between Appellant and the State of California. The evidence showed only contacts with *Rothberg in New York* and the filing of documents in the Bankruptcy Court in New York. The cause of action against Appellant did not arise out of or have a substantial connection with any activity of Appellant in California. The only "contact," if it can be called that, is that such conduct in New York had an effect upon Rothberg in California. Assuming that is true, it is submitted that such contact is insufficient to meet the constitutional standard. There has been no activity of the Appellant in California. None of Appellant's conduct has a substantial connection to California. If the rule requested by Rothberg were adopted, then it is obvious that each state court would become a national court. The argument proves too much.

The constitutional standard is based upon sufficient minimal contacts with the state such that the maintenance of the action does not offend traditional notions of fair play and substantial justice. That is still the test whether or not the alleged cause of action is based upon negligent or intentional conduct. The unstated principle and the silent error in Rothberg's argument is the proposition that in personam jurisdiction may be asserted against a nonresident defendant who commits an intentional tort regardless of contacts with the forum state. That must be his position because it is clear from the evidence set forth above that Appellant had absolutely no contacts at all with California with respect to the alleged cause of action. It must be remembered that the contract upon which Rothberg is suing was between Rothberg and the Trustee. *Appellant is not a party to that contract.* All he did was witness conversations relating to it which occurred in New York and prepare the necessary papers required by the Bankruptcy Court in New York.

Rothberg relies on two California decisions, *Abbott Power Corp.* v. *Overhead Electric Company*, 60 Cal. App. 3d 272, 131 Cal. Rptr. 508 (1976) and, *Jones* v. *Calder*, —— Cal. App. 3d ——, —— Cal. Rptr. —— (1982)[3], which involve intentional torts but which are easily distinguishable from the case at bar. In both cases there was substantial activity in California, namely letters and circulating a newspaper.

There simply are no contacts between Appellant and California relative to the case at bar. He did nothing in California. His only involvement in the case was as a witness to discussions in New York of a contract between Rothberg and the Trustee and the preparation of the necessary

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[3] This is a decision dated December 15, 1982 of the Court of Appeal. The decision is not final. On January 18, 1983, the defendant therein filed a petition for hearing in the California Supreme Court. That Court has until February 14, 1983, to rule on said petition. The Court may extend its time another 30 days. *California Rules of Court*, Rule 28(a).

papers required by the Bankruptcy Court. He had "contact" with Rothberg in New York. It is submitted that such contact is not contact with California within the constitutional principle so as to justify a California court's asserting personal jurisdiction over a nonresident.

II

The Appeal Is Not Moot.

In his application for an emergency stay directed to the Honorable William H. Renquist, Appellant argued in support of his application that he feared he would waive his obligation to the jurisdiction should he be compelled to file a general appearance in the California action, citing *Neihaus* v. *Superior Court*, 69 Cal. App. 3d 340, 138 Cal. Rptr. 905 (1977), and *Terzich* v. *Medak*, 78 Cal. App. 3d 636, 144 Cal. Rptr. 323 (1978). Nevertheless, his application for a stay was denied and thereafter Appellant filed a general appearance in the case. This harsh rule of the California courts has been criticized and avoided in many cases. *See, e.g., Goodwine* v. *Superior Court*, 63 Cal. 2d 481, 47 Cal. Rptr. 201 (1965); *Forbes* v. *Cameron Petroleum, Inc.*, 83 Cal. App. 3d 257, 147 Cal. Rptr. 766 (1978); *Berard Construction Co.* v. *Municipal Court*, 49 Cal. App. 3d 710, 122 Cal. Rptr. 825 (1975); *Fount Wip, Inc.* v. *Goldstein*, 33 Cal. App. 3d 184, 108 Cal. Rptr. 732 (1973); *Batte* v. *Bandy*, 165 Cal. App. 2d 527, 332 P.2d 439 (1958); *Bank of America* v. *Carr*, 138 Cal. App. 2d 727, 292 P.2d 587 (1956). Moreover, Appellant is aware of no decision of this Court holding that such is a waiver. However, a recent decision of the California Court of Appeal holds that a waiver does not occur should a general appearance be made after an unsuccessful challenge to the service of process. In *In Re Marriage of Smith*, —— Cal. App. 3d ——, 185 Cal. Rptr. 411 (August 31, 1982), the wife filed an action for dissolution of marriage against her husband. The husband was served contrary to law. Thereafter, a default judgment was entered against the husband. Five months later the wife instituted a proceeding to increase the child support and

properly served the husband. The husband then filed a motion to quash the original service of summons upon him and to set aside the default judgment. The husband also requested a continuance of the support proceedings which request constituted a general appearance. The wife contended that this general appearance cured whatever defect there had been in the original service of summons. The court rejected this argument and set aside the default judgment.

The opinion is significant because it discusses for the first time the effect of the enactment by the California legislature in 1969 of the Jurisdiction and Service Of Process Act, *Code of Civil Procedure*, §§ 410.10, *et seq.* The court held that the new act was a comprehensive and detailed statutory plan covering jurisdiction, process and related problems and that it preempted the entire area of law relating to such subjects. Therefore, the court concluded that the common law rules concerning such subject matter were no longer a part of California law. The court continued: "No mention is made in the Act of the common law rule . . . that a general appearance retroactively turns an invalid service into a valid one. Such a rule could easily have been stated. This omission manifests legislative rejection of the rule." —— Cal. App. 3d at ——, 185 Cal. Rptr. at 416.

Thus, in the case at bar, the filing of the general appearance by Appellant does not retroactively turn the original invalid service into a valid one. This is a salutary rule because it permits a defendant to continue to press his constitutional objection. If the rule were otherwise then he must make a choice either (1) to defend and give up his constitutional objection or (2) to take the risk and suffer the consequences of letting a default judgment be entered against him. There is no reason for forcing such a Hobson's choice upon a litigant or to denigrate his fundamental constitutional objection in such an indirect manner.

Finally, the reason why an appeal to this Court is appropriate rather than a petition for certiorari is fully set forth

in the Jurisdictional Statement, pp. 2-3. Suffice it to say that Rothberg has failed to distinguish the cases set forth therein.

Rothberg asserts that *Kulko* v. *California Superior Court*, 436 U.S. 84 (1978), precludes an appeal to this court. *See* Motion to Dismiss, p. 17. However, the two cases are distinguishable. In *Kulko*, appellant never attacked the Constitutionality of the state statute, only that jurisdiction should not be maintained over him. *See Kulko, supra* at 90 n.4. Here, Trost consistently attacked the constitutionality of § 410.10, Cal. Civ. Proc. Code (West 1982), as construed to apply to him. This attack certainly falls within the ambit of 28 U.S.C. § 1257(2).*

CONCLUSION

For these reasons, appellees motion to dismiss should be denied and this court should note probable jurisdiction of this appeal.

Respectfully submitted,

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January 26, 1983

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* Appellant submits that even if appellate jurisdiction is found lacking, this court should treat these papers as a petition for certiorari pursuant to 28 U.S.C. § 2103.